

***United States Court of Appeals
for the Second Circuit***



**INTERVENOR'S
BRIEF**

77-4057

ORIGINAL

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 77-4057

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, ET AL.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION

AND UNITED STATES OF AMERICA,

Respondents,

MCI TELECOMMUNICATIONS CORP., ET AL.,

Intervenors.

On Petition for Review of Orders of the
Federal Communications Commission

BRIEF OF INTERVENOR
AMERICAN PETROLEUM INSTITUTE

Of Counsel:

Joseph E. Keller
Wayne V. Black
Larry S. Solomon
Christine A. Meagher

Dated: May 18, 1977

Keller & Heckman
Attorneys for Intervenor
American Petroleum Institute
Suite 1000
1150 17th Street, N. W.
Washington, D. C. 20036

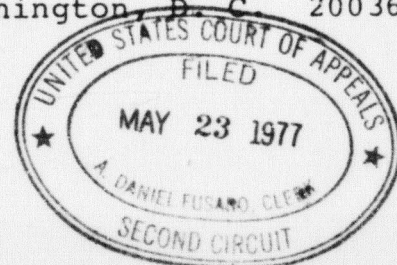


TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	iii
ISSUES PRESENTED	1
COUNTERSTATEMENT	2
A. Notice of Inquiry	3
B. The Commission's Report and Order	8
C. Memorandum Opinion and Order on Reconsideration	10
D. Interest of the American Petroleum Institute	14
SUMMARY OF ARGUMENT	16
ARGUMENT	19
I. The Commission's Orders in this proceeding were adopted pursuant to proper procedures authorized by the Administrative Procedure Act, the Communications Act of 1934 and Judicial Precedent.	19
A. Regulatory policies concerning the resale and shared use of communications common carrier facilities and services are a proper subject for rulemaking.	19
B. Rulemaking procedures followed by the Commission were proper and legally sufficient.	22
1. Procedures applicable to rulemaking and not §205(a) govern this proceeding.	25
2. A statutory requirement that a "hearing" be held may be fulfilled by procedures other than an evidentiary, trial-type proceeding.	30
C. AT&T cannot demonstrate any issues that are more appropriately resolved by a trial type hearing than by written submissions.	40
II. The Commission acted reasonably and within the mandate of its statutory authority in eliminating all restrictions on sharing.	43

	<u>Page</u>
III. The Commission was correct in concluding that sharing is not a common carrier activity, and adequate safeguards were provided to assure that sharing will not become common carriage.	50
A. Sharing is not a common carrier activity and therefore need not be regulated as such.	50
B. The FCC has provided adequate safeguards to assure that unregulated sharing will not become common carriage.	58
IV. Assuming <u>arguendo</u> that the Court finds the Federal Communications Commission acted unlawfully in eliminating all restrictions on the shared use of common carrier services and facilities, the Court should nevertheless find that some type of sharing must be permitted in order to serve the public interest.	61
CONCLUSION	63

TABLE OF AUTHORITIES

<u>COURT CASES</u>	<u>PAGE</u>
<u>American Public Gas Association v. FPC,</u> 498 F.2d 718 (D.C. Cir. 1974)	40
<u>AT&T v. FCC,</u> 449 F.2d 439 (2d Cir. 1971)	37, 38
<u>AT&T v. FCC,</u> 487 F.2d 865 (2d Cir. 1973)	38, 39
<u>Bell Telephone Company of Pennsylvania</u> <u>v. FCC,</u> 503 F.2d 1250 (3d Cir. 1974)	27, 29
<u>Ciaccio v. New Orleans Public Belt R.R.</u> 285 F.Supp. 373 (E.D. La. 1968)	51, 52
<u>FCC v. Pottsville Broadcasting Co.,</u> 309 U.S. 134 (1940)	49
<u>FCC v. RCA Communications, Inc.,</u> 346 U.S. 86 (1953)	47
<u>FCC v. Sanders Brothers Radio Station,</u> 309 U.S. 470 (1940)	62
<u>FCC v. Schreiber,</u> 381 U.S. 279 (1965)	25
<u>FCC v. WJR, The Goodwill Station,</u> 337 U.S. 265 (1949)	49
<u>Greater Boston Television Corporation v.</u> <u>FCC,</u> 444 F.2d 841 (D.C. Cir. 1970) <u>cert. denied</u> 403 U.S. 923 (1971)	48, 49
<u>Home Insurance Co. v. Riddell,</u> 252 F.2d 1 (5th Cir. 1958)	51, 52
<u>ICC v. Louisville and Nashville Railroad</u> <u>Company,</u> 277 U.S. 88 (1913)	35
<u>National Association of Regulatory Utility</u> <u>Commissioners v. FCC,</u> 525 F.2d 630 (D.C. Cir. 1976) <u>cert. denied</u> 425 U.S. 992 (1976)	50-57, 59-60
<u>Philadelphia Television Broadcasting Company v.</u> <u>FCC,</u> 359 F.2d 282 (D.C. Cir. 1966)	47

<u>Radio Relay Corporation v. FCC,</u> 409 F.2d 322 (2d Cir. 1969)	47
<u>Scripps-Howard Radio v. FCC,</u> 316 U.S. 4 (1942)	46, 62
<u>Semon v. Royal Indemnity Co.,</u> 279 F.2d 737 (5th Cir. 1960).	52, 56
<u>Siegel v. AEC, 400 F.2d 944</u> (D.C. Cir. 1968).	40
<u>State v. Sinclair Pipe Line Co.,</u> 180 Kan. 425, 304 P.2d 930 (1957)	52
<u>Upjohn Company v. Finch, 422 F.2d</u> 944 (6th Cir. 1970)	40
<u>United States v. Allegheny-Ludlum</u> <u>Steel Corporation, 406 U.S. 742 (1972)</u>	31, 48
<u>United States v. Florida East Coast</u> <u>Railway Company, 410 U.S. 224 (1973).</u>	31, 33, 34, 35
<u>United States v. Storer Broadcasting</u> <u>Company, 351 U.S. 192 (1956).</u>	27, 47
<u>Utilities Comm. v. Gulf Atlantic</u> <u>Towing Corp., 251 N.C. 105, 110</u> <u>S.E. 2d 886 (1959).</u>	52
<u>Washington Util. & Transp. Comm'n v.</u> <u>FCC, 513 F.2d 1142 (9th Cir. 1975)</u> <u>cert. denied 423 U.S. 836 (1975)</u>	4, 27
<u>WBEN, Inc. v. United States, 396 F.2d</u> <u>601 (2d Cir. 1968), cert. denied, 393</u> <u>U. S. 914 (1968).</u>	26

ADMINISTRATIVE DECISIONS AND REPORTS

Page

Memorandum Opinion and Order <u>In the Matter of American Telephone and Telegraph Company Long Lines Department</u> , 61 F.C.C. 2d 587 (1976)	37
First Report and Order, <u>Specialized Common Carrier Inquiry</u> , 29 F.C.C. 2d 870 (1971), <u>aff'd sub nom. Washington Util. & Transp. Comm'n v. FCC</u> , 513 F.2d 1142 (9th Cir. 1975), <u>cert. denied</u> 423 U.S. 836 (1975).	4
Decision, <u>Telpak Sharing</u> , 23 F.C.C. 2d 606 (1970), <u>aff'd in part and rev'd in part sub nom. AT&T v. FCC</u> , 449 F.2d 439 (2d Cir. 1971).	6, 36, 37

STATUTES AND REGULATIONS

Administrative Procedure Act, 5 U.S.C. §551 <u>et seq.</u>	<u>passim</u>
5 U.S.C. §551	20
5 U.S.C. §551(4)	21
5 U.S.C. §553	20, 22
5 U.S.C. §553(c)	22
5 U.S.C. §556	30, 33
5 U.S.C. §556(d)	32
5 U.S.C. §557	30, 33

	<u>Page</u>
Communications Act of 1934, 47 U.S.C.	
§151 <u>et seq.</u>	passim
47 U.S.C. §151	3, 25, 46
47 U.S.C. §153(h)	51
47 U.S.C. §154(i)	20, 25
47 U.S.C. §154(j)	25, 28
47 U.S.C. §201-223	9, 10, 51, 59
47 U.S.C. §201(a)	28
47 U.S.C. §201(b)	43, 44
47 U.S.C. §202(a)	43, 44
47 U.S.C. §205(a)	24, 25, 29, 30, 33, 37, 39
47 U.S.C. §309(b)	27
47 U.S.C. §316	26
Interstate Commerce Act,	
49 U.S.C. §1(14)(a)	31, 32, 34
49 U.S.C. §15(1)	35
47 C.F.R. §21.2 (1976)	51

MISCELLANEOUS

1 Davis, Administrative Law Treatise, §§6.13, §7.01	26
S. Rep. No. 781, 73d Cong. 1st Sess. 1 (1934)	46

ISSUES PRESENTED

I. Whether the Federal Communications Commission's Orders eliminating restrictions on resale and shared use of communications common carrier services and facilities was adopted pursuant to proper procedural requirements under the Administrative Procedure Act, and the Communications Act of 1934, as amended?

II. Whether the Commission was reasonably acting within the mandate of its statutory authority in eliminating all restrictions on sharing?

III. Whether the Commission's finding that sharing is not common carriage is legally sustainable, and whether adequate safeguards were provided in order to assure that sharing would not become common carriage?

IV. Assuming arguendo the Court finds that the Federal Communications Commission acted unlawfully in eliminating all restrictions on the shared use of common carrier services and facilities, whether the Court should find that some type of sharing must be permitted in order to serve the public interest?

COUNTERSTATEMENT

Traditionally, communications common carriers have provided essentially all communication services directly to the ultimate customer without any middleman or intermediary. When the communications industry was in its infancy and up until the early sixties there was little incentive to alter the industry structure or to challenge the existing carrier restrictions on resale and sharing of communications services. However, as alternative communications services became available from other specialized common carriers, and as technological developments made a variety of unique communications services available, marketplace forces began to be felt which called for changes in the traditional ways of providing communications services. It became apparent that new kinds of services, not available from established carriers, could be offered profitably by middlemen and the public demand for such services was growing. In addition, communications users found that sharing and joint use arrangements allowed them to economically and efficiently meet their communications needs. For these reasons the Federal Communications Commission (sometimes hereinafter referred to as "Commission" or "FCC") decided that it was necessary to examine existing common carrier practices which restricted the development of these services.

A. The Notice Of Inquiry

The Commission initiated the proceeding in Docket No. 20097 by a Notice of Inquiry and Proposed Rulemaking,^{1/} (hereinafter "Notice") to investigate and formulate regulatory policies concerning whether and under what conditions subscribers of the various service offerings of communications common carriers should be allowed to resell such services to others or to participate with others in the sharing or joint use of such services, and, if so, how the Commission should regulate such resale and shared use.

The Commission has the responsibility under the Communications Act, to regulate communications service so as to make available to all the people of the United States "a rapid, efficient, Nation-wide; and world-wide wire and radio communication service with adequate facilities at reasonable charges." 47 U.S.C. §151. This mandate requires the Commission to keep abreast of a rapidly developing, highly technological industry. This proceeding in particular was designed to "make room" in the existing regulatory scheme for what the Commission perceived as burgeoning new "information handling" communication services

^{1/} Notice of Inquiry and Proposed Rulemaking In the Matter of Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities, 47 F.C.C. 2d 644 (1974), J.A. 12 et seq.

for the public. In the Commission's judgment, the existing practices of established communications common carriers were stifling potential growth of these new communication services, to the detriment of the public. The Commission therefore proposed to formulate in this proceeding general regulatory policies designed to meet "a burgeoning demand for fast, efficient and low-cost access to information in convenient format and the concomitant development of innovative communications technology to meet that demand."^{2/} The Commission had already made an extensive investigation of the market for specialized common carrier services^{3/} which revealed that "the market for non-voice communications is growing at a rapid pace, is largely undeveloped and will be satisfied only through

^{2/} Notice, ¶ 2, J.A. 13.

^{3/} First Report and Order, Specialized Common Carrier Inquiry, 29 F.C.C. 2d 870 (1971), aff'd sub nom. Washington Utilities and Transportation Commission v. FCC, 513 F.2d 1142 (9th Cir. 1975), cert. denied 423 U.S. 836 (1975).

the application of innovative communications technology."^{4/}
The Commission properly perceived its responsibilities to promote and encourage the largely untapped potential for development of the highest state-of-the-art communications technology. To achieve this objective it appeared that changes in the existing restrictions on resale and sharing were necessary.

The Commission touched the tip of the iceberg on these issues nearly ten years ago in 1967, when it began an investigation into the restrictions on sharing con-

^{4/} Notice, ¶ 3 J.A. 13; the Commission added:

In this area of rapid technological and market development, we believe that both established carriers and the new entities which offer or propose to offer specialized services can contribute to breakthroughs in communication technology and plans for more efficient application of new and existing technology. However, entities other than the carriers who originate technological advances or propose new systems configurations may not be in the best position for a number of reasons deriving from regulatory and procedural as well as economic limitations, to undertake the construction of new lines of communications. Public enjoyment of state-of-the-art communications technology and full utilization of existing capacity may thus require that independent enterprises devoted to marketing, retailing, brokerage and related functions be given a greater role in the communications industry.

tained in AT&T's Telpak Tariff provisions.^{5/} Although that proceeding addressed only one specific provision of a particular carrier's tariffs, it was an early indication of the emerging demand for different types communications services.

By 1974, the year in which this proceeding was initiated, the communications industry was developing at a rapid pace, and the Commission had before it several proposals for new forms of communications services which involved aspects of resale and sharing, and for which it had no well defined regulatory policy or guidelines. The Commission noted that considerable interest had been manifested in providing so-called "value added" communications services through intermediaries. In particular, the Commission had before it three applications proposing to provide various kinds of intermediary communications services.^{6/} In addition, the Commission had before it Petitions for Rulemaking filed by two carriers on issues relating to resale and sharing.^{7/}

^{5/} Decision, Telpak Tariff Sharing Provisions, 23 F.C.C. 2d 606 (1970).

^{6/} See, Notice ¶¶ 6 and 7, J.A. 14 and 15, for description of proposals for new services.

^{7/} Notice, ¶¶ 21 and 29, J.A. 19, 22-23.

The American Telephone and Telegraph Company (hereinafter sometimes referred to as "AT&T") requested permission from the Commission to amend its private line tariff to allow resale and third party traffic where the customer intended to provide a particular type of data processing service.^{8/} In addition, the Commission was investigating whether certain tariff provisions of AT&T and Western Union were discriminatory and prohibited by §202(a) of the Communications Act since in effect they allowed certain group users defined as "single customers" to combine communication requirements and in effect resell and share the carriers' communication services while denying to others that same privilege. The Commission decided to consolidate that investigation with the instant proceeding because of the similarity of the issues involved.^{9/}

Having as its purpose the "resolution of broad policy issues relating to the availability of communication services and facilities from established carriers"^{10/} and

^{8/} Notice, ¶ 17, J.A. 18.

^{9/} Notice, ¶¶ 22-25, J.A. 20-21.

^{10/} Report and Order In the Matter of Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities, 60 F.C.C. 2d 261 (1976) J.A. 28, (hereinafter referred to as "R&O".)

the proper regulatory approach to resale operations and sharing arrangements, the Commission set forth twelve items of inquiry in its Notice of Inquiry and Proposed Rule Making.^{11/} Generally, the Commission requested comment on: (1) the justification for current restrictions on resale and shared use contained in the carrier's tariffs; (2) the potential effect on established carriers of the elimination of such restrictions; (3) whether the public interest would be served by elimination of these restrictions, and; (4) the proper regulatory approach to resale and sharing arrangements.

B. The Commission's Report and Order

The Commission's Report and Order in this proceeding adopted on July 16, 1976,^{12/} found the existing tariff restrictions on the sharing and resale of private line services to be unjust, unreasonable and unlawfully discriminatory. Having made an analysis of the economic impact of its proposed policy, the Commission specifically

^{11/} See, Notice ¶ 13, J.A. 24-25 for list of Items of Inquiry.

^{12/} R&O, ¶ 40, J.A. 58.

found that unlimited resale and sharing of private line services were just, reasonable and in the public interest,^{13/} and concluded that the elimination of the restrictions on resale and sharing of private line service would bring about substantial public benefits.^{14/} The Commission considered in great detail the legal basis for its decision to resolve the issues raised in this proceeding in a broad rule making proceeding, and concluded that it was not required by law to hold "trial-type" evidentiary hearings in this instance.^{15/} The Commission considered the extent to which it had jurisdiction over the resale and sharing activities which would result from its decision and found that resellers of communication services should be regulated as common carriers pursuant to Title II of the Communications Act.^{16/} Finding that sharing did not

^{13/} R&O ¶ 40, J.A. 58.

^{14/} R&O, ¶¶ 75-88, J.A. 78-83. The Commission identified the following public benefits: (1) the provision of communications service at rates more closely related to cost; (2) better management of the communications network, and the provision of management expertise by users and intermediaries to the carriers; (3) the avoidance of waste of communications capacity, and; (4) the creation of additional incentives for research and development of ancillary devices to be used with transmission lines.

^{15/} R&O, ¶ 2, Appendix D, J.A. 29-30, 117-126.

^{16/} R&O, ¶ 8, J.A. 33.

constitute the indiscriminate offering of a service to the public, the Commission concluded that entities engaged in sharing arrangements would not be subject to regulation under Title II of the Act.^{17/}

Although the Commission stated that it would not at this time establish any regulations for sharing arrangements, the FCC reserved its jurisdiction over sharing arrangements to take whatever action may appear necessary should these arrangements in fact become only disguised common carrier activities.^{18/}

The Commission directed that the policies set forth in its Order would become effective immediately, and that all common carriers subject to the jurisdiction of the Commission file revised tariffs eliminating restrictions on the resale and shared use of their services.^{19/}

C. Memorandum Opinion and Order on Reconsideration

Several parties in this proceeding filed Petitions for Reconsideration of the Commission's Report and Order. The Commission responded to those petitions in a Memorandum

^{17/} Id.

^{18/} R&O, ¶ 125, J.A. 106.

^{19/} R&O, ¶ 132, J.A. 109.

Opinion and Order (hereinafter "MO&O"), adopted on January 5, 1977,^{20/} which substantially affirmed its findings in the Report and Order. The Commission's opinion again considered at length the issue of whether or not evidentiary trial-type hearings were necessary to resolve the issues in this proceeding. It again made an analysis of the applicable law, policy and precedent governing this question, and concluded that the procedures it adopted for conducting this proceeding on written submissions were in compliance with the Administrative Procedure Act and the Communications Act.^{21/} The Commission also addressed AT&T's argument that the Report and Order constituted a prescription of rates since the alleged effect of the decision would be to cause a "switching" of services by customers. The FCC stated that, in its judgment, its policy decision was not a prescription of rates since no specific rate levels were considered or established,

^{20/} Memorandum Opinion and Order In the Matter of Regulatory Policies Concerning the Shared Use of Common Carrier Facilities and Services, 62 F.C.C. 2d 588 (1976), J.A. 152.

^{21/} MO&O, ¶¶ 2-4, J.A. 153-156. 5, U.S.C. § 551 et seq., 47 U.S.C. §151 et seq.

and that it was not required to determine specific rates that would flow from its decision.^{22/} The Commission further stated that it found no evidence that trial-type hearings would have established the validity of AT&T's economic impact study and concluded AT&T was not prejudiced by its failure to hold further proceedings.^{23/}

The FCC reemphasized that there was adequate evidence in the record to support its decision to eliminate resale and sharing restrictions since the carriers had failed to provide any justification for the selection of certain intermediaries entitled to service, and the denial of service to others. The Commission indicated however, that its decision was not based simply on the failure of the carriers to present adequate justification, but that the extensive comments it received from recognized sharing intermediaries presented convincing evidence that such communications operations were just and reasonable, served important public functions, and should be encouraged.^{24/}

^{22/} MO&O, ¶ 6, J.A. 156-157; additionally, the FCC analyzed the deficiencies in AT&T's economic impact study and concluded that the alleged switching of services by customers as a result of its order would not materialize. MO&O, ¶ 15, J.A. 162-164.

^{23/} MO&O, ¶ 8, J.A. 158.

^{24/} MO&O, ¶ 13, J.A. 161.

In response to the argument that "profit" was not a proper test for a determination of whether an activity is sharing or common carrier resale subject to Title II jurisdiction, the Commission stated that its jurisdictional position was not based solely upon profit, but that the basic jurisdictional criterion was whether there is "an indiscriminate offering to the public" as that concept has been developed by the courts.^{25/} It stated that it envisioned sharing without regulation as users joined together in arrangements, each seeking to join in a compatible cost beneficial arrangement, while making a more efficient allocation of communications costs, facilities and services in the public interest.

^{25/} MO&O, ¶ 21, J.A. 168-169.

D. STATEMENT OF INTEREST OF THE
AMERICAN PETROLEUM INSTITUTE

Intervenor American Petroleum Institute ("API") by its Central Committee on Telecommunications, hereby respectfully submits this brief in support of the Report and Order released by the Federal Communications Commission on July 16, 1976, supra, as modified by a Memorandum Opinion and Order released January 12, 1977, supra, which, inter alia, sets forth a general policy of permitting the unrestricted and unregulated sharing of common carrier facilities and services.

The Central Committee on Telecommunications of the American Petroleum Institute is one of the standing committees of the General Committee of Transportation of the API. Members of this Central Committee represent over 40 of the leading oil and natural gas companies in the United States. The Central Committee is, in turn, supported and sustained by more than 500 petroleum and natural gas industry communications users.

Many petroleum and natural gas companies have substantial point-to-point communication requirements related to the operation of natural gas and petroleum crude and product pipelines, as well as to exploration, production, refining, distribution and administrative activities. While some of these communications requirements are met by means of privately-owned and shared microwave systems, others are handled over leased private line facilities which are

the subject of the instant proceeding. Thus, members of the petroleum and natural gas industries have acquired broad experience with the services and facilities currently under review.^{25a/}

The Central Committee believes that the sharing of common carrier facilities and services, as outlined by the Commission, would lead to a much more efficient allocation of both communications and financial resources since the FCC program would permit the maximum utilization of communications resources at an economically beneficial price. Such an arrangement would aid in the more efficient exploration for transportation, refining and distribution of our country's vital energy sources by providing more flexible and efficient communications services and facilities.

^{25a/} Many of these companies also utilize such private line services pursuant to the provisions of Section 2.2.1(c) of AT&T's Tariff F.C.C. No. 260 which permits them to transmit "communications relating directly to the business of a subsidiary corporation over which the customer exercises control through the ownership of more than 50% of the voting stock." This provision is not under review in the instant proceeding.

SUMMARY OF ARGUMENT

The Commission's Orders eliminating restrictions on the resale and shared use of common carrier services and facilities should be affirmed by this Court.

The Commission's Orders here under review were adopted as a result of a proceeding which met all of the procedural requirements of the Communications Act of 1934, as amended, 47 U.S.C. §151 et seq., the Administrative Procedure Act, 5 U.S.C. §551 et seq., and were fully in accordance with the FCC's statutory mandate. Since the purpose of this proceeding was to formulate future regulatory policies concerning complex and technical issues, it was perfectly proper for the Commission to proceed in accordance with the provisions for rulemaking specified in the Administrative Procedure Act.

The Commission was not required to hold a formal, trial-type hearing to reach its decision in this proceeding, as the procedures followed by the Commission afforded all parties a full and fair opportunity to present their views on the issues. Furthermore, even if an evidentiary hearing were required, no party has demonstrated that it would have put forth any different evidence in support of its position than it had submitted in written comments. Therefore, there is no merit in the contention

that an evidentiary hearing would have substantially affected the policy decisions reached by the Commission.

The Commission is under a statutory obligation to declare unlawful all tariff provisions which are unjust, unreasonable or unlawfully discriminatory. As such, the FCC was properly exercising its statutory authority in eliminating all tariff restrictions on sharing since they were found to be unjust, unreasonable, unlawfully discriminatory and contrary to the public interest. Based on a comprehensive review of evidence submitted by the parties, the Commission clearly set forth its reasons for adopting policies which it deemed necessary in the public interest.

Furthermore, it is API's position that sharing, as described by the Commission, does not constitute a common carrier activity. In order to be a common carrier, an indifferent offering must be made to the clientele wishing to avail itself of the services offered. Sharing presents a situation wherein individual decisions in particular situations will be made. Therefore, the key element of a common carrier, an indiscriminate offering, is lacking. Since sharing is not a common carrier activity, it should not be regulated as such. In order to assure that unregulated sharing does not become common carriage, the Commission has provided adequate safeguards by indicating that it will retain jurisdiction and examine any allegation of common carrier activities by sharing parties on a case-by-case basis.

Assuming arguendo the Court finds that the Commission erred in permitting unlimited and unregulated sharing, the Court must nevertheless recognize that sharing is in the public interest as that determination was made by the Commission. Therefore, if the Court finds the Commission's policies in relation to unlimited and unregulated sharing to be unlawful, it must remand this issue to the Commission with instructions to develop lawful criteria under which sharing is to be permitted.

ARGUMENT

I. THE COMMISSION'S ORDERS IN THIS PROCEEDING WERE
ADOPTED PURSUANT TO PROPER PROCEDURES AUTHORIZED BY
THE ADMINISTRATIVE PROCEDURE ACT, THE COMMUNICATIONS
ACT OF 1934 AND JUDICIAL PRECEDENT.

Petitioner AT&T argues that the Commission's Orders eliminating restrictions on resale and shared use should be found invalid because of the Commission's failure to conduct an evidentiary, trial-type hearing to resolve these issues. As is more fully demonstrated below, this contention is without merit. The procedures followed by the Commission in this proceeding fully complied with statutory requirements under the Communications Act of 1934, as amended, and with the Administrative Procedure Act. Furthermore, the FCC's procedures were in accord with judicial interpretation of the Commission's statutory authority, and fully protected the rights of the parties involved.

A. Regulatory Policies Concerning the Resale and Shared
Use of Communications Common Carrier Facilities and
Services are a Proper Subject for Rulemaking.

In the Commission's judgment, because of the broad scope of this inquiry, the extensive participation which could be expected, and the complex nature of the issues

to be resolved, the most fair and efficient manner in which to conduct this inquiry was by a Notice and Comment Rulemaking as authorized by §4(i)^{26/} of the Communications Act of 1934, as amended, and §553 of the Administrative Procedure Act (hereinafter "APA") 5 U.S.C. §553.^{27/} The Commission considered a broad rule making proceeding to be the best way to examine these issues, and viewed these policy decisions as inappropriate to be considered in the context of:

. . .some particular item, such as an application for authorization of service, a tariff filing or a complaint against a particular carrier. The nature of the issues that must be considered, their complexity, their basic impact on the overall structure of the industry, the number and diversity of parties interested in the issues as well as the expedition with which they must be resolved compels . . . a broad rulemaking procedure. Notice, ¶ 4, J.A. 13.

The Administrative Procedure Act, 5 U.S.C. §551, sets forth the definition of the type of agency proceeding which falls under the rubric of "rulemaking." That Act defines a "rule" as:

^{26/} 47 U.S.C. §154(i). This section provides that:

The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.

^{27/} Notice ¶ 4, J.A. 13.

[T]he whole or a part of an agency's statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefore or evaluations, costs, or accounting, or practices bearing on any of the foregoing. 5 U.S.C. §551(4).

Rulemaking under the provisions of the APA is defined as "the agency process of formulating, amending or repealing a rule" 5 U.S.C. §551(5).

It was the Commission's intention in this proceeding to formulate general prospective policies concerning industry-wide practices on resale and shared use of communications common carrier services and facilities. As such, the issues which the Commission sought to resolve in this proceeding fall within the definition of rule making under the Administrative Procedure Act. The evolution of this proceeding illustrates how the dynamics of the communications industry and pressures from entities anxious to offer new and innovative communications services demanded that the Commission formulate general policies on resale and sharing.^{28/} Given the policy decisions

^{28/} See discussion supra at Pages 2-8 concerning the history of this proceeding.

facing the Commission, and the broad scope of the issues to which the Commission addressed itself, it was appropriate for the Commission to proceed to resolve these issues pursuant to its statutory rulemaking authority.

B. Rulemaking Procedures Followed by the Commission were Proper and Legally Sufficient.

Section 553 of the Administrative Procedure Act governing what is generally known as "Notice and Comment" rulemaking requires that an agency give "interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation" 5 U.S.C. §553(c).

In view of the nature of the issues to be addressed and the extensive participation expected, the Commission adopted procedures in the instant case which it believed would provide the fullest and fairest opportunity for all interested parties to address the issues while producing a complete and accurate record. Because of the importance of the issues in this proceeding, the Commission took additional steps beyond those required by §553 of the APA to ensure that all parties interested in participating would have an opportunity to comment on the

issues and fully state their position to the Commission.^{29/}
In addition to the usual Comments and Reply Comments normally provided for in "Notice and Comment" rulemaking proceedings, the Commission provided for a third round of submissions, responses, to allow all parties to respond to Reply Comments which were filed.

The Commission considered at great length the legal and practical requirements concerning the type of procedures it should follow in this proceeding.^{30/} It did not reach a decision to adopt Notice and Comment rulemaking procedures without analyzing with care the relevant statutory guidelines and case law. Only after thorough consideration did the Commission reach the conclusion that trial-type hearings were not required. Despite that conclusion the Commission stated that it would consider requests for further proceedings, including oral hearings, if it were shown that either further evidence was needed on specific issues, or that prejudice would result from a failure to hold such further proceedings.^{31/}

^{29/} In providing for the filing of three rounds of Comments the Commission noted that it was "establishing a procedure combining elements of both Section 553 and Section 556 and proceedings to insure that a complete and accurate record is produced." Notice, ¶ 33, J.A. 26.

^{30/} Notice, ¶¶ 32-34, J.A. 25-26. R&O, Appendix D, J.A. 117-126. MO&O, ¶¶ 2-5, J.A. 153-156.

^{31/} Notice, ¶ 25, J.A. 21.

AT&T argues that this entire proceeding involves only a single issue—that of prescription of rates—and as such the procedural standards applicable are those contained in §205(a) of the Communications Act. 47 U.S.C. §205(a).^{32/} For this reason AT&T argues that the Commission's decision is not legally sustainable because it has not had the "full opportunity for a hearing" which §205(a) requires before the Commission may prescribe rates. However, AT&T's position is without merit for the following reasons: (1) this proceeding is governed by the procedural standards applicable to rulemaking and not §205(a) since, even if issues arguably falling under §205(a) have been considered in this proceeding, that section is not determinative of the type of procedures required, and; (2) in any event, the "hearing" requirements of §205(a) have been fully met by the type of procedures followed by the Commission in this proceeding.

32/ Section 205(a) provides in pertinent part:

(a) Whenever, after full opportunity for hearing, upon a complaint or under an order for investigation and hearing made by the Commission on its own initiative, the Commission shall be of opinion that any charge, classification, regulation or practice of any carrier or carriers is or will be in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge or the maximum or minimum, or maximum and minimum, charge or charges to be thereafter observed, and what classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed. . . .

1. Procedures Applicable to Rulemaking and
Not §205(a) Govern This Proceeding.

The Commission's mandate under the Communications Act gives it the responsibility to establish federal regulatory policies for providing communication service to all the people of the United States with adequate facilities at reasonable charges. 47 U.S.C. §151. Congress has given the Commission authority to:

. . .perform any and all acts, make such rules and regulations, and issue such orders not inconsistent with this act, as may be necessary in the execution of its functions. . .
47 U.S.C. 154(i), [and]

conduct its proceedings in such a manner as will best conduce to the proper dispatch of business and to the ends of justice. 47 U.S.C. 154(j).

These provisions have been interpreted to confer on the Commission broad procedural authority to determine the manner of conducting its business which will most fairly and reasonably accomodate the proper dispatch of its business and the ends of justice. F.C.C. v. Schreiber 381 U.S. 279, 289-90. (1965).

"Notice and Comment" rulemaking proceedings, as opposed to evidentiary, trial-type hearings have been judicially approved in proceedings similar to this one. In WBEN,

Inc. v. United States, 396 F.2d 601 (2d Cir. 1968), cert. denied, 393 U.S. 914 (1968) this Court had before it an appeal from Orders of the Federal Communications Commission which revised agency rules governing sunrise operation by certain classes of AM radio stations. Parties in that case had asked the Court to overrule the Commission on the ground that the FCC had no right to depart from the status quo in a rulemaking proceeding based on the general characteristics of broad classes of radio stations. The parties contended that §316 of the Communications Act required separate evidentiary hearings to be held in situations such as this, where the revised rules resulted in a "modification" of their license.^{33/} In discussing the proper relationship between the Commission's statutory responsibility to conduct adjudicatory hearings in particular situations and its broad rule-making authority this Court concluded:

Adjudicatory hearings serve an important function when the agency bases its decision on the peculiar situation of individual parties who know more about this than anyone else. But when as here, a new policy is based upon the general characteristics of an industry, rational decision is not furthered by requiring the agency to lose itself in an excursion into detail that too often obscures fundamental issues rather than clarifies them. WBEN, Inc., supra, 396 F.2d at 618, citing 1 Davis, Administrative Law Treatise §6.13 (1965 pocket part) and §7.01.

^{33/} Section 316 of the Communications Act, 47 U.S.C. §316, requires that a licensee be given an opportunity to show cause by "public hearing" why an order modifying his license should not be issued.

In reaching that conclusion, this Court properly relied on the Supreme Court's decision in United States v. Storer Broadcasting Company, 351 U.S. 192 (1956). In that case, the Supreme Court was reviewing Orders of the Commission, adopted pursuant to a rulemaking proceeding, which established certain "concentration of ownership" rules affecting broadcast licensees. The Court held that despite the fact that former §309(b) of the Act required a "full hearing" before a license application could be rejected, the Commission could nevertheless dismiss, without a hearing, any license application which did not conform to the "concentration of ownership" rules. The Court stated that it "did not read the hearing requirement. . . as withdrawing from the power of the Commission the rulemaking authority necessary for the orderly conduct of its business." Id. at 202.^{34/}

AT&T raised a procedural issue nearly identical to the issue it raises in this proceeding in Bell Telephone Company of Pennsylvania v. FCC, 503 F.2d 1250 (3d Cir. 1974).

^{34/} See also Washington Utilities and Transportation Commission v. FCC, supra, where the Court held that the FCC could adopt a policy of "open entry" of new carriers into the specialized communications field pursuant to rule making procedures regardless of the fact that §309 of the Communications Act required a hearing on the question of whether the application of a particular carrier would be in the public interest.

In that case the Third Circuit Court of Appeals was reviewing orders of the FCC which required AT&T to provide certain types of communications services to specialized common carriers. The orders in question had evolved from general rulemaking proceedings. No evidentiary hearings were ever held.

AT&T argued that the orders were invalid because no evidentiary hearings were held, as mandated by §201(a) of the Communications Act.^{35/} In rejecting the contention that a statutory provision for a "hearing" mandated an "evidentiary hearing" the Court made the following observations which are relevant to the issues raised in this proceeding:

35/ Section 201(a) provides in pertinent part:

(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

We are persuaded instead that §201(a) should be interpreted to permit procedures less formal and adversarial than the evidentiary hearing demanded by AT&T. Three factors lead us to this conclusion. First, as the Supreme Court has suggested in FCC v. Pottsville Broadcasting Co. [309 U.S. 134 (1940)] and In re Permian Basin Area Rate Cases [390 U.S. 747 (1968)] procedural flexibility can aid the FCC in making the substance determinations that it is required to make under the Communications Act. To lock the FCC into one type of proceeding—be it evidentiary or otherwise—could jeopardize the ability of the Commission to determine the 'public interest' in a given case. Second, we view the 'per se' rule advanced by AT&T as being contrary to legislative command. Congress has empowered the FCC to conduct its proceeding in such manner as will best conduce to the proper dispatch of business and to the ends of justice. 47 U.S.C. §154(j). This direction leaves to the agency the determination of the type of procedure to be employed in a particular case. The per se approach suggested by AT&T is at odds with this flexible, discretionary standard. Third, we recognize that several courts have come to favor rule making over adjudication for the formulation of new policy. Id. at 1265.

Petitioner AT&T urges this Court to view this proceeding as involving only one issue: prescription. AT&T asks this Court to ignore the record of the issues addressed in this proceeding^{36/} and to adopt the view that this proceeding was merely an attempt by the Commission to prescribe rates and practices allegedly without fulfilling the procedural requirements of §205(a). However,

^{36/} See, Notice, ¶ 31, J.A. 2425.

the fact that issues considered in a broad rulemaking proceeding may also be related to issues which could arise under §205(a) does not dictate that the Commission must proceed under that specific statutory provision. As discussed above, policies adopted pursuant to proper rule making procedures may often determine issues which may also arise under other specific statutory sections. That fact alone however, is not determinative of the validity of the policies adopted pursuant to properly exercised rulemaking authority.

2. A Statutory Requirement That a "Hearing" Be Held May Be Fulfilled by Procedures Other Than An Evidentiary, Trial-Type Proceeding.

AT&T argues not only that the procedural requirements of §205(a) govern the proceedings here under review, but that the "hearing" requirement of that section must be interpreted to require an evidentiary, trial-type proceeding, such as provided for in §§556 and 557 of the Administrative Procedure Act for agency "adjudicatory" proceedings. The Supreme Court has considered the question of the proper interrelationship of "Notice and Comment" proceedings under §§556 and 557 in several recent

and 557 of the APA. The Court disagreed, concluding that §§556 and 557 applied only when rules are required by statute to be made on the record. Id. at 756. The absence of an explicit statutory directive that the proceedings be "on the record," or words of similar import, coupled with the fact that the proceedings under review were an exercise of "legislative rulemaking power" rather than adjudication, led the Court to conclude that an evidentiary, trial-type hearing was not required.

The Supreme Court's decision in United States v. Florida East Coast Railway Company, 410 U.S. 224 (1973) is dispositive of the issue raised by AT&T in this pro-

37/ The Court was interpreting §1(14)(a) of the Interstate Commerce Act, 49 U.S.C. §1(14)(a).

opinions. In United States v. Allegheny-Ludlum Steel, 406 U.S. 742 (1972), the Supreme Court was asked to pass on the validity of certain "car service rules", applicable to the railroad industry, which were promulgated by the Interstate Commerce Commission ("ICC"). Parties in that case argued that a specific statutory requirement providing that the ICC establish rules, regulations, and practices with respect to car service only "after hearing" made rules adopted pursuant to rulemaking provisions of §553 of the APA invalid.^{37/} The main contention was that the statutory hearing requirement automatically triggered the more formal, adjudicatory requirements of §§556

hearing" contained in 49 U.S.C. §1(14)(a) was not the equivalent of a statutory requirement that the rule be made "on the record after opportunity for an agency hearing." Id. at 238. In addressing the question of whether the hearing requirement of §1(14)(a) of the Interstate Commerce Act specifically required the submission of oral testimony, cross-examination or oral arguments, the Court noted that the Administrative Procedure Act, even when requiring a rulemaking proceeding to take place "on the record after opportunity for an agency hearing," (thus triggering the more formal requirement §556(d)) allowed

ceeding. In that case the court was asked to review an order of the Interstate Commerce Commission setting incentive per diem rates in a rulemaking proceeding. Parties challenged the ICC ruling on the grounds that §1(14)(a) of the Interstate Commerce Act, 49 U.S.C. §1(14)(a), allowing the Commission to set rates only "after hearing," required the Commission to proceed in accordance with the adjudicatory provisions of §556(d) of the Administrative Procedure Act, and that the Commission's determination to receive submissions from the parties only in written form was a violation of that section.

The Court again concluded that the phrase "after

an agency to proceed to receive evidence in written form provided no one would be prejudiced thereby.^{38/} Id. at 241. Therefore, even specific statutory language providing that proceedings take place on the record after hearing may be satisfied by evidence submitted in written form only, so long as no party is prejudiced by such proceedings.

In light of these Supreme Court decisions, even assuming arguendo, that §205(a) should govern the procedures to be followed by the Commission in this proceeding, AT&T's argument that "full opportunity for a hearing" requirement of that section dictates evidentiary, trial-type proceedings cannot be sustained. In Florida East Coast the Supreme Court was examining a hearing provision similar to §205(a) of the Communications Act.^{39/} In that case the ICC actually

^{38/} Petitioner AT&T has failed to demonstrate why oral proceedings were required for it to fully state its position to the Commission and to rebut the evidence offered by other parties, and it has not demonstrated that it was prejudiced by the failure to hold such hearings.

^{39/} See also, MO&O ¶ 6, J.A. 156. Section 205(a) requires a "full opportunity for a hearing"; Section 1(14)(1)(a) of the Interstate Commerce Act requires the ICC to act "after hearing". The Supreme Court stated however that a requirement for a "full hearing" without more would not necessarily trigger the formal adjudicatory hearing provisions of §§556 and 557 of the APA particularly where, as in this proceeding, the agency followed procedures which allowed parties a full opportunity to present evidence and address the issues. Id. at 241.

set rates in a rulemaking proceeding on the basis of written submissions only. In this proceeding the Commission has determined only policies and practices concerning resale and shared use of common carrier facilities and services. The FCC has not attempted to establish specific rates for services offered.^{40/}

In the instant proceeding, the Commission has given parties an opportunity to comment extensively, and to respond to arguments, data, and information submitted by other parties. The Commission has also indicated a willingness to consider proposals for modification of its policies after operating experience has been acquired.^{41/} Similarly, the FCC indicated a willingness to hold oral hearings if parties requesting such hearings set forth issues conducive to being resolved by oral proceedings.^{42/} In Florida East Coast, supra, the Court found similar procedures used by the Interstate Commerce Commission in the actual setting of rates to be sufficient to comply with the requirements for a hearing contained in §1(14)(a)

^{40/} The Commission specifically discussed its intention not to set rates for any services:

We believe we may require AT&T to remove the unlawful discrimination without determining the exact revenue impact thereof or setting the rates for service provided thereafter.
R&O, ¶ 49, J.A. 49.

^{41/} R&O ¶ 125, J.A. 106.

^{42/} Notice, ¶ 25, J.A. 21.

of the Interstate Commerce Act. Id. at 241. It is respectfully submitted that stricter procedural requirements than those set forth in the Florida East Coast case should not be required of the FCC in a proceeding designed to establish general communications policies only.^{43/}

^{43/} AT&T argues, however, that since the Florida East Coast case does not directly interpret a provision of the Interstate Commerce Act upon which §205(a) is modeled, it has no applicability to the standards governing this case. It urges the Court instead to rely on ICC v. Louisville and Nashville Railroad Company, 277 U.S. 88 (1913) which interprets §15(1) of the Interstate Commerce Act, a predecessor section to §205(a). The Supreme Court considered the argument that its interpretation of the hearing requirement of §15(1) of the Interstate Commerce Act in Louisville and Nashville decision dictated adjudicatory hearings under Section 1(14)(a) of the Act also. The Court rejected that argument based on the fact that in the Louisville and Nashville case the court was reviewing an adjudication of an individual complaint whereas in Florida East Coast, it was reviewing a policy decision of the ICC affecting an entire industry.

The same distinction applied in this case where the Commission is formulating communications policy for an entire industry and has made a basically legislative type judgment, for prospective application only, rather than an adjudication of a particular set of disputed facts. 410 U.S. 224, 246.

It should be emphasized that the Louisville and Nashville case was decided prior to the adoption of the Administrative Procedure Act at a time when judicial oversight of administrative proceedings was in its infancy. In that case the court was specifically addressing what it saw as the threat of agency decision-making in secret. The court expressed the fear that agency secrecy could result in a significant denial of due process if judicial type proceedings, with all the evidence on the record, were not required. Situations could arise where an agency decision was in fact reached without proper evidence and "the deficiency could be explained away on the theory that the Commission had before it extraneous, unknown but presumptively sufficient information to support the findings." ICC v. Louisville and Nashville Railroad Company, supra, 227 U.S. at 93-94 (1913). The Administrative

(Footnote continued)

AT&T's argument that the Commission's order in this proceeding is invalid rests substantially on the contention that this proceeding is identical to the Commission's investigation of AT&T's Telpak tariff (Telpak Sharing, supra). Since this Court found the Commission's Order in that proceeding invalid because all the requirements of §205(a) had not been met, AT&T argues that this Court should now find the Commission's Orders invalid in the instant proceeding.

In the first instance, this proceeding is not simply an enlargement of the earlier Telpak Sharing proceeding. That proceeding was confined to an investigation of the tariff restriction on one AT&T private line service offering. It was initiated by the Commission on the basis of complaints it had received from parties prohibited from sharing under the terms AT&T's Telpak tariff provisions. While the instant proceeding, of necessity, includes a consideration of the tariff restrictions of AT&T's Telpak tariff offering, that fact alone does not reduce the proceeding to a replay of the earlier Telpak investigation.

43/ (Footnote continued)

Procedure Act, enacted after the Supreme Court's decision in that case, was designed to address these concerns and reflect Congress' estimation of the procedures necessary to protect against such abuses.

This Court, in reversing the Commission's Order in the Telpak Sharing proceeding, found that the Commission's decision to allow everyone to take advantage of the lower Telpak rates had the effect of prescribing a general rate reduction, and therefore, the requirements relative to prescription of rates under §205(a) applied. AT&T v. FCC, 449 F.2d 439 (2d Cir. 1971).^{44/}

Even assuming arguendo that the elimination of restrictions on resale and sharing would be in effect a prescription of a "general rate reduction" making the procedural requirements of §205(a) applicable to this proceeding, there is no support for AT&T's position that the hearing requirements of §205(a) can only be met by a trial-type

^{44/} However, it has been the Commission's position that the elimination of sharing restrictions is not a prescription of the rates to be charged under the Telpak tariff R&O, ¶ 49, J.A. 64.

In this proceeding the Commission has announced a general policy to permit unlimited resale and sharing of all private line services of all communications common carriers. The FCC has not attempted to set any rates or practices for specific offerings. In FCC Docket No. 18128, 61 F.C.C. 2d 587, the Commission found AT&T's Telpak service unlawful and required AT&T to eliminate that service, although AT&T was invited to file a new bulk offering. FCC 76-886, released October 7, 1976, ¶ 209. By a letter of March 23, 1977, from AT&T Vice President James R. Billingsley to FCC Chairman Richard E. Wiley, AT&T indicated that it would not replace the bulk offering declared unlawful. Therefore, the argument that adopting a policy of unlimited resale and sharing will in effect result in a general rate reduction because customers will be able to switch to Telpak bulk rates is no longer accurate since there is no bulk rate discount available.

proceeding. AT&T cites this Court's opinion in the Telpak Sharing case, AT&T v. FCC, 449 F.2d 439 (2d Cir. 1971), as dispositive of the type of hearing required by §205(a). However, the issue of the type of hearing required by §205(a) was not even raised in that proceeding. This Court instead addressed itself to the question of whether the Commission was required to make a finding that Telpak rates were "just and reasonable" as required by §205(a). 449 F.2d 439, 451. This Court remanded that case to the Commission for further proceedings, requiring the Commission to make the findings required by §205(a), supported by a "full record" 449 F.2d at 453. At no point did this Court discuss, much less conclude, that under §205(a) the Commission must proceed by trial-type hearings.

Nor is this Court's decision in AT&T v. FCC, 487 F.2d 865 (2d Cir. 1973) dispositive, as Petitioner AT&T asserts, of the type of hearing required under §205(a). In that case, the Court examined the question of whether the Commission could, pursuant to §4(j) of the Communications Act, 47 U.S.C. 154(j),^{45/} require AT&T to obtain special permission from the Commission prior to filing any new tariff revisions relating to services under investigation in other proceedings. The "special permission" require-

^{45/} See, P. 25 supra, citing text of 47 U.S.C. §154(j).

ment had been promulgated as part of a Commission order concerning a tariff filed by AT&T revising its rates for various private line services. Id. at 864. The Commission had not addressed the "special permission" issue in any hearing, nor allowed AT&T to submit evidence on the issue. The requirement had essentially been promulgated unilaterally by the Commission. The question before the Court was whether the Commission could, pursuant to its general procedural authority under §4(j), enact such a "rate freeze," or whether such action could only be taken pursuant to the statutory scheme for tariff regulation contained in §§203, 204 and 205. This Court reached the conclusion that the "special permission" requirement was equivalent to a prescription of rates, and the Commission was authorized only to proceed pursuant to the statutory requirements of §§203, 204 and 205. While the Court quoted the language of §205(a) to the effect that the section requires a "full opportunity for a hearing," it did not hold that the requirement could only be fulfilled by a trial-type proceeding. Id. at 874. The issue of the type of hearing required by §205(a) was not before the Court. Therefore, AT&T's reliance on this case for the proposition that only a "trial-type hearing" could satisfy the statutory directive of §205(a) is misplaced.

C. AT&T Cannot Demonstrate Any Issues That Are More Appropriately Resolved by a Trial-Type Hearing Than By Written Submissions.

Courts have held that a party requesting trial-type proceedings must show that adjudicatory procedures in the agency's resolution of issues would have made a difference. Upjohn Company v. Finch, 422 F.2d 944, 955 (6th Cir. 1970), Siegel v. A.E.C., 400 F.2d 778, 782, 784-75 (D.C. Cir. 1968), American Public Gas Association v. FPC, 498 F.2d 718 (D.C. Cir. 1974).

AT&T has not demonstrated that any such issues in this proceeding. Instead, AT&T refers repeatedly to the need for evidentiary hearings to resolve "material issues of fact" and "complex factual matters" (AT&T Brief at 19) but does not support these general statements with an explanation of the type of evidence it could have brought forth at a trial-type, evidentiary hearing that could not have been presented just as fully in written form.^{46/}

^{46/} AT&T refers to two issues which it claims required resolution at trial-type hearings: (1) whether the creation of middlemen between carriers and users will adversely affect the public, and; (2) the revenue and rate impact of the Commission's Order (Br. at 55-56). No explanation is given as to why these issues are more appropriately addressed in oral as opposed to written proceedings.

AT&T further claims that "no opportunity was afforded the parties for an evidentiary hearing" (Br. at 9). However, the Commission's Notice in this proceeding specifically stated that:

. . .we are providing with regard to all issues herein, we will set oral proceedings on specific issues should parties make a showing that they would be prejudiced unless oral hearings are held. Notice, ¶ 25, J.A. 21.

The Commission stated that such requests should be included in final response comments. In response to this invitation AT&T, in its final submission, stated that it:

. . .does not believe that the submission of further comments directed to the overall issue of resale and sharing of communications service or to the carriers' existing tariffs is necessary. The public has been on notice, since July 5, 1974, of this proceeding and all interested persons have been given ample opportunity to file comments with this Commission. Response, ¶ 48, J.A. 1321.

AT&T further noted, that

[e]verthing from the status quo to unlimited and unregulated resale and sharing has heretofore been proposed and all parties have now had an opportunity to comment thereon. Response, note at 32, J.A. 1321.

Such statements are difficult to explain in light of AT&T's position in this case that it has been prejudiced by a denial of an opportunity for an evidentiary hearing.

In view of the foregoing, there is no basis for this Court to conclude that the Commission Order is invalid because the Commission did not hold an evidentiary, trial-type hearing.

II. THE COMMISSION ACTED REASONABLY AND WITHIN
THE MANDATE OF ITS STATUTORY AUTHORITY IN
ELIMINATING ALL RESTRICTIONS ON SHARING

The Commission indicated that a major factor leading to the institution of the instant proceeding was the existence of certain specific tariff provisions which allowed certain "intermediaries" to obtain service on behalf of third parties, while other users were denied the opportunity to obtain service in a similar manner. R&O, ¶¶ 27-33, J.A. 48-53. The Commission set out in this proceeding to determine, inter alia, whether tariff provisions restricting shared^{47/} use of common carrier services and facilities were just and reasonable under Sections 201(b)^{48/}, and not unjustly or unreasonably discriminatory under Section 202(a) of the Communications Act^{49/}.

^{47/} The Commission has defined sharing as: "a non-profit arrangement in which several users, perhaps having no community of interest other than to communicate between the same two geographic points or to communicate with each other, collectively use communications services and facilities obtained from an underlying carrier or a resale carrier, with each user paying the communications-related costs associated with subscription to and collective use of the communications services and facilities according to its pro rata usage of such communications services and facilities." R&O ¶23, J.A. 46.

"A bona fide sharing arrangement exists wherein each participant has a communications need (other than a need to resell the service to others) for the services and facilities being shared." R&O, ¶120, J.A. 102.

^{48/} 47 U.S.C. §201(b) provides, in part, that:

"All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful..." (footnote continued)

Because specific tariff restrictions on sharing constituted restraints imposed up on a subscriber's use of the facilities and services of a common carrier, the tariff provisions under review were found to be "practices, classifications and regulations" subject to Section 201(b) of the Act. After a careful analysis of whether these tariff provisions were just and reasonable, the Commission concluded that such tariff provisions were, in fact, neither just nor reasonable, and therefore unlawful. R&O, ¶¶ 34-40, J.A. 54-58.

The Commission also found that tariff provisions created and administered by the carriers, and never approved by the agency, allowing some parties to share through the use of intermediaries while prohibiting the same type of arrangements to other parties similarly situated, were prima facie discriminatory. MO&O ¶13, J.A. 161. Only "unjust or unreasonable discrimination" is proscribed by §202(a) of the Communications Act; nevertheless, the subject tariff provisions were declared unlawful because (1) the carriers failed to provide any justification for the selection of

48/ (footnote continued) 47 U.S.C. §202(a) provides that:

"It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage."

certain parties entitled to share, and (2) the carriers failed to explain why certain parties were prohibited from sharing. R&O ¶41, J.A. 59; MO&O, ¶ 13, J.A. 161; See also R&O, Appendix "E", J.A. 127.

The Commission's conclusion that sharing through intermediaries is just and reasonable was not based solely on the failure of the carriers to justify certain tariff restrictions but also on the extensive comments of sharing intermediaries attesting to the benefits to be derived from the sharing of common carrier services and facilities. The Commission went on to state that:

The sharing arrangements as described in the record in this proceeding are, in our view, convincing evidence that such communications operations serve an important public function and should be encouraged if we are to carry out our mandate under the Communications Act. The record fully supports our conclusion that unlimited sharing of communications services and facilities, both in joint use arrangements and through intermediaries, is just and reasonable. MO&O ¶ 13, J.A. 161, citing ARINC Comments at 4-50, J.A. 755; SIAC Comments at 3-35 J.A. 702.

Based upon its reasoned consideration, the FCC therefore concluded that unlimited and unrestricted sharing is just and reasonable, nondiscriminatory, and would be beneficial to the public interest, convenience and necessity, R&O ¶¶ 75 to 88, J.A. 78-83, without any severe adverse impact on the using public or the carriers. R&O ¶40, J.A. 58^{50/} The Commission thus relied on its own evaluation of

^{49/} Upon reconsideration, the Commission stated that:
(footnote continued)

the needs of the public and the industry, and demonstrated the beneficial purposes which would flow from its unlimited sharing policy. This policy was deemed necessary in order to serve the public interest, and in order to enable the Commission to meet its statutory mandate from Congress.

MO&O, ¶¶ 13, J.A. 161.

The Communications Act of 1934 created the Federal Communications Commission "with regulatory power over all forms of electrical communication"^{51/} for the purpose of:

...regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges....
(47 U.S.C. §151).

The purpose of the Communications Act is to protect the public interest in communications.^{52/} Because Congress could not have anticipated the variety and nature of methods of communication that would come into existence, or the complexity associated with regulating communications, Congress

^{49/} (footnote continued)

"We have reviewed this matter again and conclude that unlimited resale and sharing of private line service would not have an adverse economic impact on the carriers or the public." MO&O, ¶15, J.A. 163.

^{50/} Senate Committee on Interstate Commerce, Report on Communications Act, S. Rep. No. 781, 73d Cong. 1st Sess. 1 (1934).

^{51/} Scripps-Howard Radio v. FCC, 316 U.S. 4, 14 (1942).

placed the regulation of such industries in a specialized agency with broad powers. In such a situation, the expert agency which is entrusted with the administration of such a dynamic industry is entitled to latitude in coping with new developments in that industry.^{53/} The Court should thus be hesitant to interfere with the conclusions of expert agencies when they are reconcilable with statutory directions.^{54/}

In reviewing an agency decision such as the one under review here, the Court's task is limited to determining:

whether the Commission has been guided by proper considerations in bringing the deposit of its experience, the disciplined feel of the expert, to bear; that is, whether the Commission has fairly exercised its discretion within the vaguish, penumbral bounds expressed by the standard of public interest. Radio Relay Corp. v. FCC, 409 F.2d 322, 326 (2d Cir. 1969) citing FCC v. RCA Communications, Inc., 346 U.S. 86, 91 (1953).

In determining whether the Commission was guided by "proper considerations," it is necessary to ascertain whether the Commission took a "hard look" at the salient issues which it was addressing. Courts should not inquire into the soundness of the reasoning by which the Commission reached its conclusion. Rather, the reviewing Court should ascertain whether that conclusion is rationally supported.

^{52/} Philadelphia Television Broadcasting Co. v. FCC, 359 F.2d 282, 284 (D.C. Cir. 1966).

^{53/} United States v. Storer Broadcasting Co., 351 U.S. 192, 203 (1956).

United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742, 749 (1972). If the Commission has not shirked its fundamental task, however,

...the court exercises restraint and affirms the agency's action even though the court would on its own account have made different findings or adopted different standards....the court will uphold [the agency's] findings...if the agency's path may reasonably be discerned, though the Court must not be left to guess as to the agency's findings or reasons. Greater Boston Television Corp. v. FCC, 444 F.2d 841, 851 (D.C. Cir. 1970) cert. denied 403 U.S. 923 (1971).

As has been demonstrated, the Commission reached its ultimate determination to permit unlimited and unregulated sharing after a careful analysis of the evidence presented in the Comments, Reply Comments and Responses, and upon a careful analysis of Petitions for Reconsideration.

Thus, the Commission clearly delineated its reasoning for the policies which it chose to follow, while exercising valid administrative discretion within the confines of its statutory authority and mandate. Therefore, the Court should defer to the Commission's determination. As the Court stated

^{54/} In fact, the same issues raised by the Petitioners in this appeal were squarely dealt with in the Commission's Order on Reconsideration. See, e.g., MO&O, ¶¶ 20-24, J.A. 168-170.

in Greater Boston Television, supra:

Assuming consistency with law and the legislative mandate, the agency has latitude not merely to find facts and make judgments, but also to select the policies deemed in public interest."
444 F.2d 841, 851 (emphasis added).

Having reached a decision to eliminate all restrictions on the sharing of common carrier facilities and services, so long as the FCC has not abused its discretion and remained within its statutory authority, the Commission's policy decision must rest on its own doorstep, and the Court should not interfere.^{55/}

^{55/} See, FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 144-145 (1940); FCC v. WJR The Goodwill Station, 337 U.S. 265 (1949)

III. THE COMMISSION WAS CORRECT IN CONCLUDING THAT SHARING IS NOT A COMMON CARRIER ACTIVITY, AND ADEQUATE SAFEGUARDS WERE PROVIDED TO ASSURE THAT SHARING WILL NOT BECOME COMMON CARRIAGE.

A. Sharing Is Not A Common Carrier Activity And
Therefore Need Not Be Regulated As Such

This section, dealing with "sharing", will address points raised mainly by the Petitioners' Briefs filed by United System Service, Inc. and Telenet Communications Corporation. Since both of those briefs conclude that sharing constitutes a common carrier activity, and rely heavily on the case of National Association of Regulatory Utility Commissioners v. FCC, 525 F. 2d 630 (D.C. Cir.), cert. denied, 425 U.S. 992 (1976) (sometimes hereinafter referred to as "NARUC"), a careful analysis of that case, with respect to the issue of what constitutes a common carrier, is in order.

In the NARUC case, a major issue before the United States Court of Appeals for the District of Columbia was whether the classification of Specialized Mobile Radio Systems (SMRS) by the FCC as "noncommon carriers" was sustainable. The Court held that in the absence of indications that the SMRS would in practice behave as common carriers by holding themselves out indifferently to serve the user public, the Commission classification of noncommon carrier was upheld. The Court recognized that classifying the SMRS as noncommon carriers was the pivot upon which the FCC's plan for regu-

lating SMRS turned, and that its plan made clearly inapplicable the stringent rate and service regulations of Title II common carrier provisions. 47 U.S.C. §§201-223.

Section 3(h) of the Communications Act, 47 U.S.C. §153(h), defines a common carrier as "...any person engaged as a common carrier for hire...." The Rules and Regulations of the FCC define a communication common carrier as: "any person engaged in rendering communication service for hire to the public." 47 C.F.R. §21.2 (1976). In the NARUC case, supra, the Court found the concept of "the public" to be sufficiently indefinite so as to invite an examination into the common law of carriers in order to construe the definition of a common carrier found in the Communications Act of 1934, as amended. The Court found that the quintessential issue in determining what constitutes a common carrier is the "quasi-public" character of the activity involved. To create this quasi-public character it is not enough that a carrier offer his service for a profit.^{56/} Id. at 641. Implicit in the common carrier concept is the factor that to be a common carrier, one must undertake to carry for all people indifferently.^{57/}

^{56/} If only the profit issue were considered, this would bring in the definition of private contract carriers which the courts have consistently excluded from the common carrier definition, See, Home Ins. Co. v. Riddell, 252 F.2d, 1 (5th Cir. 1958); Ciacchio v. New Orleans Public Belt RR, 285 F. Supp. 373 (E.D. La. 1968).

The Commission recognized this issue in its Report and Order where it stated that "...once an element of profit enters into an arrangement otherwise characterized as sharing, we will consider whether Title II jurisdiction is required. We base this position not merely on the presence of profit.

The Court in the NARUC case conceded that services offered by a common carrier need not be made available to the entire public. One may be a common carrier though its service be highly specialized so as to be of utility only to a limited segment of the population. Additionally, reasonable requests for service could be refused because it is not the normal type of service offered, or because the common carrier's capability has been exhausted. *Id.* at 641. The Court stated that:

a carrier will not be a common carrier where its practice is to make individualized decisions, in particular cases, whether and on what terms to deal. It is not necessary that a carrier be required to serve all indiscriminately; it is enough that its practice is, in fact, to do so. *Id.* at 641.

Consequently, in order to be a common carrier, one must hold oneself out indiscriminately to the clientele one is suited to serve. In the NARUC case, the District of Columbia Circuit Court found:

56/ (footnote continued)

Rather, we look to the substantial likelihood of an indiscriminate offering to the public...." R & O ¶120, J.A. 102.

57/ NARUC, *supra*, 525 F.2d at 641 footnote 58, citing Semon v. Royal Indemnity Co., 279 F.2d 737, 739 (5th Cir. 1960); Home Ins. Co. v. Riddell, 252 F.2d 1, 3 (5th Cir. 1958); Ciaccio v. New Orleans Public Belt R.R., 285 F. Supp. 373, 375 (E.D. La. 1968); State v. Sinclair Pipe Line Co., 180 Kan. 425, 304 P.2d 930, 941 (1957); Utilities Comm. v. Gulf Atlantic Towing Corp., 251 N.C. 105, 110 S.E.2d 886, 889 (1959).

Since given private and common carriers may therefore be indistinguishable in terms of the clientele actually served, it is difficult to envision a sensible line between them which does not turn on the manner and terms by which they approach and deal with their customers. The common law requirement of holding oneself out to serve the public indiscriminately draws such a logical and sensible line between the two types of carriers..... This public-private dichotomy is generally regarded as synonymous with the distinction between common carrier and noncommon carrier operators. Id. at 642.

Based on the established definition of a common carrier, the task in the instant proceeding requires an examination of whether there is a substantial likelihood that "sharers", as defined by the Commission, will hold themselves out to indifferently serve those members of the public who seek to avail themselves of the particular shared services. Leaving aside the question of whether the Commission must regulate parties which are common carriers pursuant to Title II of the Act, the essential question of what constitutes common carriage is how the entity functions. Id. at 644. Therefore, the FCC's classification of an activity is not the determining factor. In the NARUC case, the Court held that:

[W]e affirm the Commission's classification not because it has any significant discretion in determining who is a common carrier, but because we find nothing in the record or the common carrier

definition to cast doubt on its conclusions that SMRS are not common carriers. Id. at 644 (Footnotes omitted.)

The Court footnoted this statement in order to make clear the fact that an agency does not have unfettered discretion to confer or not confer common carrier status upon a given entity depending on the regulatory goals it seeks to achieve. The Court nevertheless concluded that the FCC's finding that SMRS were not common carriers could be reconciled with the proposition that an agency does not have unfettered discretion to confer or not confer common carrier status, if those findings were read to mean that the Commission could have treated SMRS as common carriers by imposing upon them requirements which would have made them common carriers. The Commission clearly had the discretion to require all SMRS to serve all potential customers indiscriminately, thus making them common carriers. Id. at 644 n. 76. Therefore, the agency could have created common carriers by prescribing certain methods of operation.

The foregoing discussion presents an excellent analogy to the instant proceeding. The question to be resolved herein is not whether the FCC calls sharing a common carrier activity or not, but rather, could it have required sharers to offer indiscriminate service to the public; or, since the FCC did not so require in this instance, will sharers indiscriminately hold themselves out in offering service to the public.

Borrowing from the test established in the NARUC case, supra, to make the determination of whether sharing constitutes a common carrier activity, the Court should look to (1) whether there is any compulsion for sharers to serve indifferently and, if not; (2) whether there are any reasons, implicit in the nature of sharing operations, to expect an indifferent holding out to the user public wishing to avail itself of these services.

Insofar as the FCC Orders under review are concerned, the Commission emphasized in both its Report and Order and Memorandum Opinion and Order that "sharing" would not be subject to common carrier regulation. Therefore, sharing parties are under no compulsion to indiscriminately offer their services to any clientele.

Turning to the issue of whether, sharing might lead to "indiscriminate holding out", it does not appear that the concept of sharing would lend itself to any sort of indifferent offering. For example, and as the Commission points out, the principal advantage of sharing is the economic benefit. MO&O ¶23. Both the subscriber to the service, and the sharing parties enjoy desired communications capacity at a lower cost than if each had to secure the same services on an individual basis. Therefore, the main ingredient in a sharing arrangement would be to find compatible sharing parties on a case-by-case basis. Since the services cannot be simultaneously utilized, each prospective sharer's time requirements would have to be taken into account. Thus, the times of operation required would be a sound basis for

accepting or rejecting potential shares. Similarly, it appears that the compatibility of the intended use of the shared service would be another aspect in considering whether a proposed sharer would be accepted or rejected and, of course, one would not wish to share private line services and facilities with a competitor.

This type of decision making by a sharer clearly indicates that sharers will have a practice of making individualized decisions, in particular cases, whether and on what terms to deal and there is no indication that any other type of practice will be employed.^{58/} Therefore, sharing would not constitute a common carrier activity. See, NARUC, supra, 525 F.2d at 641; Semon v. Royal Indemnity Co., 279 F.2d 737, 739-740 (5th Cir. 1960).

A particular activity, such as sharing, would constitute a common carrier activity because of the way it functions, and not because the FCC declares or does not declare it to be such. Consequently, an agency does not have discretion in determining who is a common carrier. This court should nevertheless affirm the FCC's determination that sharing does not constitute a common carrier activity

^{58/} It should be noted that any inquiry into the possible types of operations by sharers can, at best, be only highly speculative since currently "unlimited sharing" is not permitted and a determination of exactly how sharing will work is not possible. The Commission did leave sharing open to further investigation if it does appear to be a common carrier activity. See, discussion, infra.

because there is nothing within the established definition of a common carrier, nor in the record, to cast doubt on the Commission's conclusions that sharers are not common carriers. NARUC, supra. 525 F.2d at 644. Since sharers are therefore not common carriers, the question of regulation of sharers in accordance with Title II need not be considered. If sharers are not common carriers, there is no need to regulate them as such.

B. The FCC Has Provided Adequate Safeguards To
Assure That Unregulated Sharing Will Not Become
Common Carriage.

As has been demonstrated above, sharing as defined by the Commission in the instant proceeding is not a common carrier activity. The issue has been raised, however, that since the Commission permitted totally unregulated sharing, such activity could turn into a common carrier activity. Prescinding from the issue of whether the Commission's powers under Title II are mandatory or discretionary there are adequate safeguards in the Commission's Orders under review to assure that unlimited, unregulated sharing will not become a common carrier activity.

The Commission clearly recognized the potential problem of sharing becoming common carriage. It noted that there are specific criteria which have traditionally been reviewed in defining a common carrier. The Commission's Orders indicate that, should it be called upon to rule on whether a particular entity is providing sharing, or common carriage, it "will not hesitate to make a factual finding regarding whether the offering is being made indiscriminately,"^{59/} and it "will resolve the matters according to the facts of the particular situation."^{60/}

^{59/} R&O ¶ 125, J.A. 106.

^{60/} R&O ¶ 128, J.A. 107-108.

At the outset, it must be emphasized that the type of unlimited sharing provided for by the Commission in this proceeding has never before been practiced. Therefore, any examination of how sharing will operate is highly speculative at best. Even though there is no indication that sharers will hold themselves out indiscriminately to the public, assuming arguendo that they did, this would still not be a sufficient basis for imposing the burdens associated with common carrier regulation, when the Commission has found that such regulation would place an unreasonable burden on sharing entities.^{61/} In making a similar holding in the NARUC case, the Court stated that:

In so holding, we do not foreclose the possibility of future challenge to the Commission's classification, should the actual operations...appear to bring them within the common carrier definition. Id. at 644

Therefore, if sharers by practice and experience show themselves to be common carriers, then, at that time, the Commission must determine its responsibilities under the common carrier provisions of Title II of the Communications Act.

Since it would be impossible at this time to make a determination as to how the sharing entities will behave once full scale implementation of this portion of the Com-

^{61/} RAO 19, J.A. 33-34. See also, NARUC, supra, 533 F.2d at 643-44.

mission's program is effective, it is likewise impossible for the Court to make a necessary assessment of sharing activity at this time. Consequently, the Court must affirm, for the present time, that portion of the Commission's Orders permitting unregulated sharing since there will be ample opportunity to challenge the activity of sharing parties when and if the need arises.^{62/}

^{62/} In the NARUC case the Court found that even in the face of possible future anticompetitive effects, since the FCC retained the duty of continual supervision to assure that these affects do not surface, the mere fact that such effects could arise was not a barrier to upholding the FCC's decision. Id. at 638.

IV. ASSUMING ARGUENDO THAT THE COURT FINDS THE FEDERAL COMMUNICATIONS COMMISSION ACTED UNLAWFULLY IN ELIMINATING ALL RESTRICTIONS ON THE SHARED USE OF COMMON CARRIER SERVICES AND FACILITIES, THE COURT SHOULD NEVERTHELESS FIND THAT SOME TYPE OF SHARING MUST BE PERMITTED IN ORDER TO SERVE THE PUBLIC INTEREST.

As demonstrated in the foregoing arguments, the Orders of the Commission here under review were based on a valid exercise of administrative discretion within the bounds of the Commission's statutory authority. Therefore, the Commission's Orders should be affirmed. Assuming arguendo the Court finds that these Orders are in some respects invalid, it is incumbent on the Court to uphold the Commission's findings that sharing arrangements are in the public interest.

The Commission specifically requested parties in this proceeding to comment on, inter alia, whether the public interest would be better served by removing all restrictions on the sharing of private line services and facilities.^{63/} Based on the response to that inquiry, and in particular, the extensive comments of intermediaries which had experience in offering shared service arrangements, the Commission found that sharing served the public interest. The Commission stated that the sharing arrangements as described in the record were "convincing evidence that such communications operations serve an important function and should be encouraged

^{63/} Notice #31, J.A. 24-25.

if we are to carry out our mandate under the Communications Act."^{64/}

The Commission was careful to emphasize that its findings were not solely based on the fact that existing carrier restrictions on sharing were unlawfully discriminatory. The conclusion was also based on the Commission's judgment that substantial public benefits could be expected to result the sharing of common carrier facilities and services.

Since the Commission in a valid exercise of statutory authority, has found sharing to be in the public interest, the Court should affirm that finding, particularly in view of the fact that Congress created the FCC to protect the public interest in communications. Scripps-Howard Radio v. FCC, 316 U.S. 4, 14 (1942); FCC v. Sanders Brothers Radio Station, 309 U.S. 470 (1940).

Consequently, if the Court finds that the Commission erred in prescribing unlimited and unregulated sharing, it should remand only the issue of regulation of sharing to the Commission with instructions to develop criteria for sharing which would withstand judicial scrutiny.

^{64/} MO&O ¶13 J.A. 161, citing comments of ARINC at 4-50, J.A. 755 and those of SIAC at 3-35, J.A. 702. The Commission discussed the benefits to flow from its program at R&O ¶¶75-88, J.A. 78-83

CONCLUSION

For the foregoing reasons, the Commission's Orders under review should be affirmed.

Respectfully submitted,

KELLER AND HECKMAN
Attorneys for Intervenor
American Petroleum
Institute

by Larry S. Solomon
LARRY S. SOLOMON
1150 17th Street, N.W.
Washington, D. C. 20036
(202) 457-1134

Of Counsel:

Joseph E. Keller
Wayne V. Black
Christine A. Meagher

Dated: May 18, 1977

CERTIFICATE OF SERVICE

I, Janet L. Kniedler, hereby certify that the foregoing
"Brief of Intervenor American Petroleum Institute" was served
this 18th day of May, 1977, by mailing true copies thereof,
U.S. mail, postage prepaid, to the following persons at
the addresses shown below:

Werner K. Hartenberger, Esq.
John E. Ingle, Esq.
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

The Honorable Griffin Bell
Attorney General of the United States
Department of Justice
Washington, D.C. 20530

Joel Grant, Esq.
Robert B. Nicholson, Esq.
John J. Powers, III, Esq.
Department of Justice
Appellate Section
Washington, D.C. 20530

Herbert E. Marks, Esq.
Stephen R. Bell, Esq.
Wilkinson, Cragun & Barker
1735 New York Avenue, N.W.
Washington, D.C. 20006
Attorneys for Remote Processing
Service Section of ADAPSO, Inc.

Jeremiah Courtney, Esq.
Arthur Blooston, Esq.
2120 L Street, N.W.
Washington, D.C. 20037
Attorneys for American Trucking
Associations, Inc.

Michael H. Bader, Esq.
Kenneth A. Cox, Esq.
William J. Byrnes, Esq.
Raymond C. Fay, Esq.
Haley, Bader & Potts
1730 M Street, N.W.
Washington, D.C. 20036
Attorneys for MCI Telecommunications,
Corp., and Microwave Communications,
Inc.

Charles M. Meehan, Esq.
Carole C. Harris, Esq.
Keller & Heckman
1150 17th Street
Suite 1000
Washington, D.C. 20036
Attorneys for Utilities Telecommunications
Council

James E. Landry, Esq.
1709 New York Avenue, N.W.
Washington, D.C. 20036
Attorney for Air Transport Association
of America

Charles R. Cutler, Esq.
John L. Bartlett, Esq.
Kirkland, Ellis & Rowe
1776 K Street, N.W.
Washington, D.C. 20006
Attorneys for Aeronautical Radio,
Inc.

Mahlon M. Frankhauser, Esq.
Michael Yourshaw, Esq.
Kirkland, Ellis & Rowe
1776 K Street, N.W.
Washington, D.C. 20006
Attorneys for Securities Industry
Automation Corp.

J. Roger Wollenberg, Esq.
David R. Anderson, Esq.
William T. Lake, Esq.
Wilmer, Cutler & Pickering
1666 K. Street, N.W.
Washington, D.C. 20006

- and -

Ronald S. Rolfe, Esq.
Cravath, Swaine & Moore
One Chase Manhattan Plaza
New York, New York 10005
Attorneys for International Business
Machines Corp.

Charles Lister, Esq.
888 16th Street, N.W.
Washington, D.C. 20006

- and -

Alfred A. Green, Esq.
J. Robert Fitzgerald, Esq.
195 Broadway
New York, New York 10007

- and -

Edgar Mayfield, Esq.
Post Office Box 32
Room 4B-112
Bedminster, New Jersey 07921
Attorneys for American Telephone and
Telegraph Company

Thormund A. Miller, Esq.
Richard S. Kopf, Esq.
James M. Tobin, Esq.
Southern Pacific Building
One Market Plaza
San Francisco, California 94105

- and -

Howard G. Kristol, Esq.
Reboul, MacMurray, Hewitt, Maynard
& Kristol
75 Rockefeller Plaza
New York, New York 10019
Attorneys for Southern Pacific
Communications Company

Robert S. Potter, Esq.
Patterson, Belknap, Webb & Tyler
30 Rockefeller Plaza
New York, New York 10020
Attorney for Dow Jones & Company,
Inc.

John R. Baskin, Esq.
Baker, Hostetler & Patterson
1956 Union Commerce Building
Cleveland, Ohio 44115
Attorney for United Press International,
Inc.

Aloysius B. McCabe, Esq.
Michael Yourshaw, Esq.
Kirkland, Ellis & Rowe
1776 K Street, N.W.
Washington, D.C. 20006
Attorneys for American Newspaper Pub'ishers
Association, The Associated Press
and Commodity News Service, Inc.

Philip M. Walker, Esq.
1050 17th Street, N.W.
Washington, D.C. 20036

- and -

Donald E. Ward, Esq.
1050 17th Street, N.W.
Suite 840
Washington, D.C. 20036
Attorneys for Telenet Communications
Corp.

Joel Yohalem, Esq.
James L. Winston, Esq.
1828 L Street, N.W.
Washington, D.C. 20036
Attorneys for Western Union Telegraph
Company

Edward P. Taptich, Esq.
McKenna, Wilkinson & Kittner
1150 17th Street, N.W.
Washington, D.C. 20036
Attorney for Graphic Scanning Corporation
and Graphnet Systems, Inc.

Joseph M. Kittner, Esq.
McKenna, Wilkinson & Kittner
1150 17th Street, N.W.
Washington, D.C. 20036
Attorney for Computer and Business
Equipment Manufacturers Association

Stroock & Stroock & Lavan
61 Broadway
New York, New York 10006
Attorneys for Western Union International,
Inc.

May 18, 1977

Janet L. Kniedler

Janet L. Kniedler